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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,

Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Respondent.

BRIEF FOR RESPONDENT

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NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE, *Petitioners,* *against* BETHLEHEM SHIPBUILDING CORPORATION, LTD., *Respondent.*	No. 38

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, Second Circuit (per Clark, C. J.) is reported in 103 F. (2d) 765. The District Court's opinion has not been officially reported, but it appears at R. 5.

STATEMENT OF THE CASE

The only relevant fact in this case is that respondent is a Delaware corporation, and raised timely objection under § 51 of the Judicial Code (28 U. S. C. 112) to the venue of a suit brought against it by New Jersey citizens and residents in the Southern District of New York solely on the ground of diversity of citizenship.

The statement of this Court, in *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, at page 211, with respect to a suit in the New Jersey federal court, affords a model of brevity for a description of this case, as follows:

> "The plaintiff was a citizen of New York; the defendant a Delaware corporation; the federal jurisdiction rested wholly on diversity of citizenship; and neither party was a citizen of New Jersey. Thus, there was a sound objection to the venue."

If the words "New York" and "New Jersey" are transposed, and the reference to the plaintiff is made plural, the foregoing quotation precisely describes the case at bar.

The petitioners' statement of the case, as well as their argument, places emphasis upon the alleged fact that the respondent has a substantial amount of its property within the jurisdictional limits of the Southern District of New York. This would be irrelevant, if true. However, the record citations given by petitioners (all from their own bill of complaint) do not support the statement.

At page 2 of their brief, petitioners refer to R. 16 and R. 32 (at which we find only allegations relating to New York Harbor, which embraces both the Southern and Eastern Districts of New York[1]), R. 35 and R. 36 (at which we find no allegations even relating to the subject), and R. 43 (at which we find a reference to Staten Island, to-wit Richmond County, a part of the Eastern District of New York[1]). The facts are that the respondent had no plants in the Southern District of New York when this suit was commenced against it, although it did have plants in the Eastern District (Kings and Richmond Counties) and in

[1]Judicial Code, § 97, 28 U. S. C. 178.

other states, but that it had some office furniture and records in the Southern District of New York.

All of the facts stated at page 3 of the petitioners' brief, except the reference to the respondent's state of incorporation, to the provisions of respondent's certificate of incorporation and to respondent's qualification to do business in New York, are taken from an affidavit made by their own attorney, entirely on information and belief, to the effect that respondent's principal office and "chief books and records" are in the Southern District of New York. We did not answer this affidavit, as the point seemed irrelevant in view of the clear statutory mandate in § 51 which confines venue, in cases where jurisdiction is founded only on diversity of citizenship, to the district of the residence of either the plaintiff or the defendant. In the District Court petitioners concurred in our view, for they expressly conceded that respondent did not have its "residence" in New York within the meaning of Judicial Code § 51.[2] Not until they reached the Circuit Court of Appeals did they make the argument now contained in Point II of their brief, (pp. 32-54), which is based entirely upon the statement of alleged facts made by their attorney on information and belief.

STATUTE INVOLVED

§ 51 of the Judicial Code (28 U. S. C. 112), so far as material, provides as follows:

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[2] In their reply brief in the District Court, the petitioners said "This [referring to their argument on the motion] involves no contradiction of Bethlehem's two propositions: * * * II. That 'Bethlehem is not a resident of the Southern District of New York within the meaning of section 51 of the Judicial Code.'"

"* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

QUESTIONS PRESENTED

The questions presented are:

1. Was respondent, a Delaware corporation, and alleged in the bill to be a citizen and resident of Delaware (R. 10), a "resident" of the Southern District of New York when this action was commenced against it, within the meaning of Judicial Code § 51?

2. If the first question is answered in the negative, had respondent waived its right to object to the venue of this action, under Judicial Code § 51, because, in 1918, it had designated, pursuant to the laws of the State of New York, an agent to receive service of process against it?

For the sake of brevity, these two questions will be sometimes referred to hereinafter as the "residence" and "waiver" questions.

PETITIONERS' STATEMENT OF "QUESTIONS PRESENTED"

The petitioners' question numbered "1" is in effect two questions, separated by the "and thereby" phrase. The first

question,—whether "the local courts" will take jurisdiction of an action under certain circumstances,—is a question of local law, not of federal law, and does not relate to the venue of suits in the federal courts. As stated by the petitioners, it can obviously be answered "yes", without in any way affecting the question of federal law presented after the "and thereby" phrase. The "question" following that phrase must be answered in the negative. Submission by a foreign corporation to state court jurisdiction over its person, through qualifying to do business and designating an agent for the service of process, cannot constitute the waiver of a privilege explicitly accorded by federal statutes.

The petitioners' question numbered "2" is not justified by the facts. It *assumes* that the respondent's "main business headquarters, * * * and a substantial part of its properties are located" in the Southern District of New York. There is nothing in the record which supports the second *assumed* fact, and the *actual* fact is that *none* of the respondent's properties, except office furniture and some of its records, was located in the Southern District of New York when this suit was commenced against respondent. The only evidence as to the "main business headquarters" of respondent is found in an affidavit made on information and belief by petitioners' attorney. However, even if the facts assumed in this question were correctly stated, it would have to be answered in the negative, for the reason that Judicial Code § 51 in terms makes the test of venue dependent, not upon facts of the character relied upon by the petitioners, but upon the district of residence, which this Court has held, with respect to corporations, to mean a district in the state of incorporation.

SUMMARY OF ARGUMENT

The respondent stands upon two propositions: (1) it is not a "resident" of the Southern District of New York within the meaning of the Judicial Code § 51; and (2) it did not waive its right to object to the venue of this action. Both are firmly settled by decisions of this Court; and the substantial question in this case is whether this Court is to overrule them.

As to the first proposition, this Court has firmly established that, for the purpose of venue, a corporation's "residence" is in the state of its incorporation, *and in no other state*. *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *In re Keasbey and Mattison Co.*, 160 U. S. 221; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363; *Luckett* v. *Delpark, Inc.*, 270 U. S. 496. See also *Ex parte Schollenberger*, 96 U. S. 369, 377; *Western Loan Co.* v. *Butte & Boston Min. Co.*, 210 U. S. 368; *Male* v. *Atchison &c. Ry.*, 240 U. S. 97; *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 271; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211; *International Milling Co.* v. *Columbia Co.*, 292 U. S. 511, 519.[3] The rule established by this Court affords

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[3]Cases in the lower federal courts to the same effect include: *Yanuszauckas* v. *Mallory S. S. Co.*, 232 Fed. 132 (C. C. A. 2d, 1916); *McLean* v. *State of Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938), cert. den. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 20; *Central West Public Service Co.* v. *Craig*, 70 F. (2d) 427 (C. C. A. 8th, 1934); *De Dood* v. *Pullman Co.*, 53 F. (2d) 95 (E. D. N. Y. 1931), aff'd 57 F. (2d) 171 (C. C. A. 2d, 1932); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v.

a clear and easily applied test for determining whether suits involving corporations are brought in the proper court, and it gives full effect to the purpose of Congress to restrict the jurisdiction of the federal courts, as evidenced by the repeal in 1887[4] of so much of the old venue statute[5] as permitted defendants to be sued wherever they might be "found" (see *Smith* v. *Lyons*, 133 U. S. 315, 319; *Galveston &c. Railway* v. *Gonzales*, 151 U. S. 496, 499; *Camp* v. *Gress*, 250 U. S. 308, 312). Petitioners present no persuasive reasons for substituting, for the simple rule so often adhered to by this Court, an indefinite test dependent upon variable factors such as the location of the corporation's books or business, or its convenience in defending the suit. Hence the petitioners were correct in the position that they took in their bill (R. 10) and in the District Court, viz., that respondent is a "citizen and resident of the State

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Reliance Life Ins. Co., 24 Fed. Supp. 144 (W. D. La., 1938); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penna., 1910). See also: *Hazeltine Corporation* v. *White*, 68 F. (2d) 715, 716 (C. C. A. 2d, 1934); *Toulmin* v. *James Mfg. Co.*, 27 Fed. Supp. 512 (W. D. N. Y., 1939); *Automotive Equipment, Inc.* v. *Trico Products Corporation*, 10 Fed. Supp. 736, 738 (S. D. N. Y., 1935); *Brehm* v. *Delaware & H. R. Corporation*, 1 Fed. Supp. 217, 218 (S. D. N. Y., 1931); and *Fruit Industries, Ltd.* v. *Metro Glass Bottle Co.*, 18 Fed. Supp. 489, 492-493 (N. J., 1937).

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[4]Act of March 3, 1887, c. 373, sec. 1, 24 Stat. at L. 552, as corrected by Act of August 13, 1888, c. 866, sec. 1, 25 Stat. at L. 433.

[5]Act of March 3, 1875, c. 137, 18 Stat. at L. 470.

of Delaware"; and they are wrong in their later shift to the position that respondent is a "resident" of the Southern District of New York.

The proposition that the appointment by a foreign corporation of an agent to receive service of process against it does not constitute a waiver of the federal statutory right to contest improper venue, has likewise been established by decision of this Court, *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.[6] The petitioners in effect argue that that decision should be reconsidered and overruled; their argument is based upon their interpretation (1) of the legislative history of the New York statute, and (2) of the opinion of this Court in *Ex parte Schollenberger*, 96 U. S. 369. We believe both interpretations to be erroneous and strained, and the first to be irrelevant. The New York statute cannot affect the federal privilege; nor indeed does it purport so to do. The *Schollenberger* decision was based upon the prior statute which expressly extended venue to include any state

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[6] The principle of the *Denton* case has been applied by the lower federal courts in the following cases: *McLean* v. *State of Mississippi*, 96 F. (2d) 741, cert. den. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 20; *Heine Chimney Co.* v. *Rust Engineering Co.*, 12 F. (2d) 596 (C. C. A. 7th, 1926); *Toulmin* v. *James Mfg. Co.*, 27 Fed. Supp. 512 (W. D. N. Y., 1939); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Hamilton Watch Co.* v. *George W. Borg Co.*, 27 Fed. Supp. 215 (N. D., Ill. 1939); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penn., 1910); *Platt* v. *Massachusetts Real-Estate Co.*, 103 Fed. 705 (Mass., 1900).

where the defendant could be "found". The petitioners are in effect contending for judicial reenactment of the old venue statute, which was applied to foreign corporations in the *Schollenberger* case, but which was repealed by the Congress in 1887.

ARGUMENT

POINT I.

RESPONDENT IS NOT A "RESIDENT" OF THE SOUTHERN DISTRICT OF NEW YORK WITHIN THE MEANING OF JUDICIAL CODE, § 51.

1. The decisions of this Court firmly establish the proposition that, for the purpose of venue, a corporation has its "residence" in the state of its incorporation, and in no other state.

In *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, this Court held:

> "* * * that under the existing Act of Congress [now Judicial Code, § 51] a corporation, incorporated in one state only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State" (145 U. S. at p. 453).

This proposition has been reaffirmed in an unbroken line of decisions of this Court, including *Southern Pacific*

Co. v. *Denton*, 146 U. S. 202; *In re Keasbey and Mattison Co.*, 160 U. S. 221; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363; *Luckett* v. *Delpark, Inc.*, 270 U. S. 496. See also *Ex parte Schollenberger*, 96 U. S. 369, 377; *Western Loan Co.* v. *Butte & Boston Min. Co.*, 210 U. S. 368; *Male* v. *Atchison &c. Ry.*, 240 U. S. 97; *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 271; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211; *International Milling Co.* v. *Columbia Co.*, 292 U. S. 511, 519. It has likewise been applied by the lower federal courts in many cases, including *Yanuszauckas* v. *Mallory S. S. Co.*, 232 Fed. 132 (C. C. A. 2d, 1916); *McLean* v. *State of Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938), cert. den. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 20; *Central West Public Service Co.* v. *Craig*, 70 F. (2d) 427 (C. C. A. 8th, 1934); *De Dood* v. *Pullman Co.*, 53 F. (2d) 95 (E. D. N. Y., 1931); aff'd 57 F. (2d) 171 (C. C. A. 2d, 1932); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstotz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penna., 1910). See also: *Hazeltine Corporation* v. *White*, 68 F. (2d) 715, 716 (C. C. A. 2d, 1934); *Toulmin* v. *James Mfg. Co.*, 27 Fed. Supp. 512 (W. D. N. Y., 1939); *Automotive Equipment, Inc.* v. *Trico Products Corporation*, 10 Fed. Supp. 736, 738 (S. D. N. Y.,

1935); *Brehm* v. *Delaware & H. R. Corporation*, 1 Fed. Supp. 217, 218 (S. D. N. Y., 1931) and *Fruit Industries, Ltd.* v. *Metro Glass Bottle Co.*, 18 Fed. Supp. 489, 492-493 (N. J., 1937).

This brief would be unduly lengthened if we attempted to discuss all of the decisions of this Court in which the principle is stated and applied. We will, therefore, refer only to one of the more recent decisions on the point, in which this Court not only reaffirmed the principle but also refused to hear argument to the contrary. *Seaboard Rice Milling Company* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363. An action at law to recover damages for negligence was brought in the Eastern District of Missouri by a Texas corporation against a railroad corporation organized under the laws of Illinois and Iowa. The defendant maintained a branch office and operated a branch line of its railroad within the Eastern District of Missouri. The defendant appeared specially and filed a plea to the jurisdiction on the ground that neither it nor the plaintiff was a resident or inhabitant of the District. The District Court sustained the plea and dismissed the suit for want of jurisdiction, and a direct writ of error was allowed on the jurisdictional question. The defendant then made a motion in this Court to affirm the judgment below, upon the ground that the question raised with respect to the decision below was so unsubstantial as not to need further argument. The motion was granted and the decision of the District Court was affirmed by this Court without further argument. In its opinion, this Court said (270 U. S. at p. 366):

> "It is immaterial whether the general federal jurisdiction in the present suit is founded upon

diversity of citizenship alone, or whether the suit is also one arising under the laws of the United States, since neither the Milling Company nor the Railway Company is a resident of the Eastern District of Missouri; *a corporation being, within the meaning of the jurisdictional statutes, a resident of the State in which it is incorporated, and not a resident or inhabitant of any other State, although it may be engaged in business within such other State.* * * *" (Italics added.)

In so far as we know, there is only one recent decision which questions the principle. In *Dodge Mfg. Co.* v. *Patten*, 60 F. (2d) 676 (1932), the Seventh Circuit Court of Appeals held that a Delaware corporation had acquired a residence in Indiana for the purpose of venue. As the Court below pointed out (R. 89), that decision was based entirely upon a decision of Mr. Justice Harlan on circuit in *U. S.* v. *Southern Pacific R. R. Co.*, 49 Fed. 297 (N. D. Cal., 1892), and the Seventh Circuit Court of Appeals failed to note the later contrary decisions of this Court cited above, in several of which Mr. Justice Harlan dissented (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501, 511. *Cf. Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357). The *Dodge* decision has never been followed in any other circuit and recently a district court in the same circuit has refused to follow it. *Hamilton Watch Co.* v. *George W. Borg Co.*, 27 Fed. Supp. 215 (N. D. Ill., 1939).

Explanation of the result reached in the *Dodge* case may perhaps be found in the fact that there had been a trial at which the defendant had established a right to a decision on the merits. Accordingly, no one but the plaintiff would

have benefited from belated recognition of the defendant's venue objection. Since the defendant could have waived the objection, and undoubtedly would have waived it had it been apprised of the court's decision on the merits, the court naturally sought to avoid giving the plaintiff another bite at the apple as a result of the initial error in overruling the defendant's venue objection made in advance of trial (*Patten* v. *Dodge Mfg. Co.*, 23 F. (2d) 852 (D. C. Ind., 1928)).

2. The rule established by this Court affords a clear and easily applied test for determining whether suits involving corporations are brought in the proper district.

Petitioners in their brief (p. 41) recognize the desirability of a simple criterion for determining questions of jurisdiction involving corporations. Thus, they approve the principle established by this Court that a corporation is a citizen only of its state of incorporation, and of no other state, for the purpose of determining diversity of citizenship questions. Certainly there are equally strong reasons for a simple criterion for determining questions of venue. As Judge Clark said, in his opinion for the court below in the present case (R. 89):

> "Indeed, so long as the citizenship of a corporation for jurisdictional purposes is determined by the state of its incorporation, there would seem no good reason for a different view of the venue requirements. The limitation of suits against a corporation implicit in the rule as to jurisdiction would be of comparatively little effect if all plaintiffs who lived outside the state of incorporation could sue

the corporation at will wherever it carried on business."

The petitioners contend that there should be a departure from the simple and readily applied test for determining the residence of corporations for the purpose of venue to which this Court has adhered, and that instead, the residence of a corporation should be determined in each case upon a weighing of various indefinite and variable factors, such as the location of the corporation's books and "evidence" [*sic*, Petitioners' brief, p. 53], the convenience with which it could defend the action, the convenience of the plaintiffs who seek to sue it, and finally, whether the business which the corporation transacts in the state is "substantial".

The petitioners refer to the "recognized purpose of the venue provision, to permit a corporation to be sued where it does its business and has its books, rather than to require it to take its books and its evidence to a distant place" (Petitioners' brief, p. 53). Of course, that is not the purpose of the venue provision. The venue provision limits the jurisdiction of suits to the home of the defendant (or the home of the plaintiff in diversity of citizenship cases). It is no concern of the courts or of Congress if defendants choose to take their books or their evidence away from their home, with knowledge that they may be called upon to defend suits at their home.

Another virtue which the petitioners claim for their rule is that "it will require a corporation to answer suit in the federal courts in the district where it can most conveniently defend or where, if doing business, it can be most conveniently sued by the plaintiff" (Petitioners' brief,

p. 53). As to the corporation's convenience, the answer is obvious. If a corporation is sued outside the state of its incorporation in a place where it can conveniently defend the suit, it can simply waive the venue requirement and permit the suit to proceed against it.

As to the plaintiff's convenience, the answer is equally obvious. Certainly we know of no authority, and petitioners have referred to none, establishing a vested right in plaintiffs to bring suits in the most convenient federal courts, particularly where, as here, the federal court of the plaintiffs' choice is across the street from a state court which can give complete relief to the plaintiffs.

The practical difficulties with the petitioners' test are apparent. If there were once a departure from the simple criterion of corporate residence heretofore applied by the courts, practically every suit in the federal courts involving foreign corporations would, at the very outset, involve useless and expensive controversies as to whether the venue could be legally established.

3. The rule established by this Court gives full effect to the intention of Congress to restrict the jurisdiction of the federal courts.

Prior to 1887, the federal venue statute provided that corporations, and other defendants, could be sued wherever they were "found".[1]

This Court held in *Ex parte Schollenberger*, 96 U. S. 369, that a corporation was "found" in any state where it had qualified to do business as a foreign corporation and

[1] Act of March 3, 1875, c. 137, 18 Stat. at L. 470.

appointed an agent for the service of process upon it, although at the same time it reaffirmed the principle that "a corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter * * *" (96 U. S. at p. 377). The result of this decision was, of course, that corporations could be sued in any district where they were *legally* doing business, even though none of the parties resided in the district.

In 1887 Congress repealed this venue statute,[8] and provided that the venue of suits based upon diversity of citizenship should be limited to districts where either the plaintiffs or the defendants resided.

This Court has recognized that the purpose of Congress in enacting the 1887 legislation was to restrict the jurisdiction of the federal courts. See *Smith* v. *Lyons,* 133 U. S. 315, 319; *Galveston &c. Railway Co.* v. *Gonzales,* 151 U. S. 496, 499; *Camp* v. *Gress,* 250 U. S. 308, 312.

Nor is there any apparent reason why that healthy trend should be reversed, and why this Court should now overrule its established construction of the venue statute so as to open up the federal courts to increased litigation. Yet, the petitioners, by giving a new interpretation to the residence requirement of the venue statute, would go even beyond the old statute, for they seek a rule that a corporation could be sued not only where it legally did business, but also wherever it could conveniently defend or wherever the plaintiffs could conveniently sue or wherever the corpora-

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[8]Act of March 3, 1887, c. 373, Sec. 1, 24 Stat. at L. 552, as corrected by Act of August 13, 1888, c. 866, Sec. 1, 25 Stat. at L. 433.

tion's books or "evidence" was located. We submit that their argument completely disregards the Congressional intent in the 1887 enactment and that the clear purpose of Congress in changing the venue statute is given full effect by the rule established by this Court.

4. Petitioners have presented no persuasive reasons justifying a departure from the rule established by this Court, and applied by the Court below, for determining the residence of corporations for the purpose of venue.

The burden of petitioners' arguments is that the prior decisions of this Court are all distinguishable, or that they were wrongly decided. On these points, we prefer to rest on the able opinion of the Court below (R. 87-90).

Inasmuch as the petitioners' criticisms of, and glosses on, the settled opinions of this Court appear to us to be hypertechnical, we cannot answer them in detail without ourselves appearing hypertechnical. But as the argument has been made, we answer it "in kind".

(a) We cannot find the expression of doubt seen by the petitioners in the opinion in *Camp* v. *Gress*, 250 U. S. 308, at p. 312, as to the soundness of the decision in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 144 (Petitioners' brief, p. 47, footnote 48).

(b) The petitioners intimate that the *Shaw* decision and the cases following it are inconsistent with certain other cases involving entirely different questions. Thus, they cite *Picquet* v. *Swan*, 5 Mason 35, Fed. Cas. #11134 (C. C. Mass., 1828) and *Toland* v. *Sprague*, 12 Pet. 300, both

of which involved the venue of suits against individuals[9]; *Galveston &c. Ry. Co.* v. *Gonzales*, 151 U. S. 496, which determined that a corporation incorporated in a state containing more than one district could be a resident of only one of such districts; and cases dealing with the sufficiency of jurisdictional allegations of citizenship in complaints. Obviously, the inconsistency suggested by petitioners does not exist.

(c) The petitioners devote an extended discussion to the thesis that the decisions prior to the *Shaw* case foreshadowed a different result (Petitioners' brief, pp. 42-45). Whether the thesis is right or wrong, it certainly is wholly immaterial.

(d) The petitioners attempt to distinguish the *Shaw* case, and the decisions following it, on the ground that the rule there stated was broader than was required for the decisions. The fallacy of their attempted distinction is illustrated if we compare the statement of this Court in the *Shaw* case

> "* * * that under the existing Act of Congress a corporation incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit at law or in equity brought by a citizen of a different State"

with the paraphrase of that sentence in the petitioners' brief (p. 49):

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[9]The language in *Picquet* v. *Swan* and *Toland* v. *Sprague* to which petitioners apparently refer, dealing with the distinction between the words "citizenship" and "residence" for the purpose of venue, was only *dictum*, since in neither case did it appear that the defendant was a citizen of the State in which suit was brought.

> "* * * that a corporation incorporated in one state and transacting its business there does not become an inhabitant of another state merely by there transacting a portion of its business through agents appointed by it for that purpose."

Thus, the petitioners interpret the decision in the *Shaw* case as a holding that a corporation does not become an inhabitant of another state *merely* by doing business there, as if the presence of other factors, in addition to the mere doing of business, might change the result; whereas the decision actually was that a corporation cannot be sued outside of its state of incorporation by non-residents *even though* it does business in another state.

(e) The petitioners criticize this Court for having said in the *Shaw* case that "The word 'inhabitant', in that act [the venue provision in the Judiciary Act of 1789[10]], was apparently used, not in any larger meaning than 'citizen', but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State, * * *" (145 U. S. at p. 447). But the reasoning of this Court as to the meaning of the word "inhabitant" appears to us to have been good sound sense, and in any event it has become the settled interpretation of the statute.

(f) The petitioners further suggest, at p. 34 of their brief, that the coupling, in the original venue statute, of the test of "finding" with the test of "inhabitancy" indicated that Congress thought of the "finding" as being of the same nature or quality as the habitation. The language

[10]Act of September 24, 1789, § 11, 1 Stat. at L. 79.

does not appear to us, as it did not appear to this Court, to compel any such conclusion. The two thoughts were obviously contesting,—the one of where the corporation was "at home"—its habitation,—the other of where it might temporarily be found.

(g) Finally, the petitioners suggest that further evidence of an erroneous interpretation by this Court in the *Shaw* case is found in the fact that the venue clause supplemented a provision that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court" (Petitioners' brief, pp. 34-38). In their discussion following this statement, which is meaningless by itself, they state that the venue provision was adopted *because* Congress had placed territorial limits upon the process of the Circuit Courts, and that the purpose of the original venue provision was to protect parties from being sued in districts distant from their homes. If this was the purpose of Congress in enacting the original venue statute, it certainly failed to carry it out, since it permitted suits wherever the defendant could be "found", even though the presence of the defendant within the district might be of the most temporary character. Obviously, it was not until the 1887 repeal of the "finding" provision that Congress evidenced an intent to protect parties from being sued in districts distant from their legal homes. Whatever argument it is that petitioners are trying to make at this point (the nature of which we must confess is not clear to us), is based upon a misunderstanding of the purpose of the original venue statute and upon a confusion between the concept of jurisdiction over the person and the concept of venue.

POINT II.

RESPONDENT DID NOT WAIVE ITS RIGHT TO OBJECT TO THE VENUE OF THIS ACTION WHEN, IN 1918, IT QUALIFIED TO DO BUSINESS IN NEW YORK AS A FOREIGN CORPORATION AND DESIGNATED AN AGENT TO RECEIVE SERVICE OF PROCESS AGAINST IT.

Since neither any of the petitioners nor the respondent is a resident of New York, the decision below must be affirmed unless respondent has waived its right to object to the venue of the action. At the outset there are several matters relating to the waiver question about which there is no dispute here.

1. Respondent's right to object to suit against it in the Southern District of New York by the non-resident petitioners is a personal privilege provided by Judicial Code § 51, which may be waived (Petitioners' brief, pp. 7-10);

2. The petitioners' waiver argument is based entirely upon the appointment by respondent of an agent to receive service of process against it, and not upon the fact that respondent does business in the Southern District of New York; and

3. Respondent has not waived the privilege by any action or any failure to act, since the commencement of this action.

The precise question remaining is whether respondent's designation of an agent to receive service of process, when

it qualified to do business in New York in 1918, was a waiver for all time of its right to make venue objections under Judicial Code § 51. Respondent denies that the designation had any such effect.

1. In *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, this Court held that the appointment by a foreign corporation of an agent to receive service of process against it does not constitute a waiver of the corporation's right to object to the venue of suits not brought in compliance with Judicial Code, § 51.

The precise point on which petitioners' waiver argument is based was squarely decided adversely to petitioners and favorably to respondent in *Southern Pacific Company* v. *Denton*, 146 U. S. 202.[11] In that case a resident of the Eastern District of Texas sued a Kentucky corporation in the Western District of Texas for damages resulting from the defendant's negligence in the latter District. The

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[11]The same principle has been applied by the lower federal courts in the following cases: *McLean* v. *State of Mississippi*, 96 F. (2d) 741, cert. den. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 20; *Heine Chimney Co.* v. *Rust Engineering Co.*, 12 F. (2d) 596 (C. C. A. 7th, 1926); *Toulmin* v. *James Mfg. Co.*, 27 Fed. Supp. 512 (W. D. N. Y., 1939); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Hamilton Watch Co.* v. *George W. Borg Co.*, 27 Fed. Supp. 215 (N. D., Ill. 1939); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penn., 1910); *Platt* v. *Massachusetts Real-Estate Co.*, 103 Fed. 705 (Mass., 1900).

petition alleged that defendant was doing business in the Western District and that it had an agent there for that purpose. The defendant filed "an answer or demurrer" on the ground that from the petition it appeared that the court was without jurisdiction. This demurrer was overruled by the court below. In this Court, the plaintiff contended "that the plaintiff in error had consented to be sued in the Western District of Texas by doing business and appointing an agent there" under a Texas statute requiring a foreign corporation desiring to transact business in the state to file, among other papers, "a resolution of its board of directors or stockholders, * * * authorizing service of process to be made upon any of its officers or agents" in Texas engaged in transacting its business (146 U. S. at pp. 206-207).

In reversing the decision below, the Court made two *alternative* answers to that contention: (1) the Texas statute referred to was unconstitutional and void, so that no validity or effect could be given to any action of the corporation pursuant thereto; and (2) the designation of agents for the service of process, pursuant to the statute, did not affect the defendant's right to object to the venue of the action. These two alternative grounds of decision, both of which are applicable to our case, were stated as follows (146 U. S. at pp. 207-208):

> "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to

its provisions. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Texas Land Co.* v. *Worsham*, 76 Texas 556. Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. It did not undertake to declare the corporation to be a citizen of the State, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the State. *Lafayette Ins. Co.* v. *French*, 18 How. 404. It might likewise have subjected the corporation to the jurisdiction of a Circuit Court of the United States held within the State—so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was found. *Ex parte Schollenberger*, 96 U. S. 369, *New England Ins. Co.* v. *Woodworth*, 111 U. S. 138; *In re Louisville Underwriters*, 134 U. S. 488. But such an agreement could not, since Congress (as held in *Shaw* v. *Quincy Mining Co.* above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up non-compliance with that test, when sued in a Circuit Court of the United States."

Both grounds of decision are applicable to our case. The New York statute in our case would, like the Texas statute in the *Denton* case, be unconstitutional if construed as the petitioners wish it to be construed, that is to say, as requiring as a condition to entry of a foreign

corporation into the State of New York to do business, that the foreign corporation should file a designation which would have the effect of waiving the privilege of the foreign corporation to contest venue in a federal court action.

The petitioners in their argument here, and indeed the Court below itself in its opinion in our favor, overlooked the fact that the first ground of decision in the *Denton* case (invalidity of the State statute if construed as the petitioners would construe it) is applicable here. Assuming the contrary (as they do), the petitioners argue that this Court's discussion of the waiver question in the *Denton* case was only a dictum and not, as we may contend, *an alternative ground for decision.* The Court below answered that argument in the following language (R. 91):

> "The appellants attempt to distinguish this case on several grounds going to show that this statement was dictum only, unnecessary to the decision. It was, however, a direct statement on the point in question and has been accepted as authoritative. It is true that in the *Denton* case the Texas statute authorizing qualification of a foreign corporation to do business in the state was held unconstitutional, since it required as a condition of such qualification that the corporation relinquish its right of removal of cases to the federal courts. But the holding that there was no waiver was made an alternative ground of decision."[12]

[12]The opinion of the Court below goes on to discuss two contentions made by the petitioners in that Court, but which they have apparently now abandoned, *i.e.*, that the Texas statute had been repealed before the *Denton* suit was brought, and that correspondence between the petitioners' attorney and the present Secretary of State of the State of Texas indicated that no actual designation under the statute by the

The petitioners also profess to see "two principles fundamentally inconsistent with each other" lurking in the *Denton* decision, as well as in *Shaw* v. *Quincy Mining Company*, which has already been referred to in Point I, *supra*. If we understand them correctly, the petitioners' argument is that the principle that a corporation is a citizen and resident only of the state of its incorporation is inconsistent with the principle established by the *Denton* case that the designation of an agent for service of process is not an express waiver of future venue objections. We see no such inconsistency. The petitioners' argument assumes (Petitioners' brief, p. 28) that under the concept of corporate citizenship and residence, it would take something more than a mere consent to receive service of process in order to bring a corporation before a court outside the state of its incorporation. Of course, that is not true. It is too well settled to admit of argument that if a corporation in one state does business in other states it is subject to the jurisdiction of the courts in such other states, providing process can be served in a proper manner upon it. Given the doing of business within the state, the court's jurisdiction is complete upon either the service or acceptance of process, and no "consent to be sued" or "consent to appear" is necessary.

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defendant corporation in the *Denton* case could now be found in his files. The court below disposed of these contentions, as follows (R. 91):

> "It is also claimed that the act had already been repealed, and that the Texas records do not disclose any actual designation of the defendant corporation. But the facts stated by the court show that the repeal came after the action was brought, and the decision was rendered on the basis, admitted on the record, that the corporation had complied with the statute."

As a matter of historical interest, it may be pointed out that before the decision of this Court in the *Denton* case, there was some confusion in the decisions of the lower federal courts, and the petitioners have been able to find some earlier decisions,[13] and a dictum,[14] which support their argument.

There has also been a recent decision by the Tenth Circuit Court of Appeals in *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 100 F. (2d) 770 (1938), in which this Court has granted certiorari and which will be argued immediately before our case. The Tenth Circuit Court of Appeals was careful to state that its decision was being placed on a special ground, viz., its construction of certain Oklahoma statutes. However, with the exception of the *Oklahoma Packing* case, and one other District Court decision which was affirmed on a different

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[13] *Shainwald* v. *Davids*, 69 Fed. 704 (N. D. Cal., 1895); and *Consolidated Store Service Co.* v. *Lamson Consolidated Store-Service Co.*, 41 Fed. 833 (C. C. Mass., 1890) (Petitioners' brief, p. 30, footnote 35). In view of the fact that the same judge who decided the latter case later reversed himself in *Platt* v. *Massachusetts Real-Estate Co.*, 103 Fed. 705 (Mass., 1900), the citation of the decision in another case (*Haight & Freese* v. *Weiss*, 156 Fed. 328 (C. C. A. 1st, 1907)), which did not involve the question here under consideration, is of no significance. The *Shainwald* case was decided on the untenable ground (POINT I, *supra*) that the defendant, a New York corporation, became an "inhabitant" of California within the meaning of § 51 of the Judicial Code by reason of having appointed an agent in California for the service of process.

[14] *United States* v. *Sheridan*, 119 Fed. 236 (W. D. Ky., 1902, Petitioners' brief, p. 30, footnote 35). Since that case involved a special statutory provision relating to suits against sureties on bonds given to the United States, it had nothing to do with the question presented in the present case.

ground on appeal,[15] the lower federal courts have consistently applied the principle established in the *Denton* case.[16]

2. The petitioners' argument that the designation of an agent under the New York statute was an express "consent to be sued" or "consent to appear", so that such a designation waived all future venue objections which the respondent might have, is based entirely on (1) a misunderstanding of the legislative history of the New York statute under which respondent's agent was designated, (2) a tortured and incorrect interpretation of the decision of this Court in *Ex parte Schollenberger*, 96 U. S. 369, and (3) a complete disregard of the effect upon that decision of the 1887 revision of the venue statute by Congress.

The petitioners contend that the designation of an agent, pursuant to the New York statute, was an express waiver of the venue objection here asserted. They do not question the proposition that there would have been no waiver if respondent had been doing business in New York *without* qualifying as a foreign corporation, which proposition is supported by the cases cited in Point I, *supra*, as well as by the cases cited in this part of our brief.

In order to support such an express waiver, the petitioners are forced to look for something in the New York statutes *requiring* foreign corporations to make it. If

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[15] *Patten* v. *Dodge Mfg. Co.*, 23 F. (2d) 852 (Ind., 1928), which was affirmed by the Seventh Circuit Court of Appeals in *Dodge Mfg. Co.* v. *Patten*, 60 F. (2d) 676 (1932), upon the equally untenable ground that the corporation there involved had become a resident of a state other than that in which it was incorporated.

[16] In the cases cited at p. 22, footnote 11, *supra*.

there were such a statutory requirement, it would be unconstitutional under the principle of this Court's decision in the *Denton* case. However, we need not dwell on that question, because the petitioners can find nothing in the statutes constituting such a requirement, and nothing in the designation constituting such a waiver. The language of the designation is as follows (R. 59):

> "Said corporation, [respondent] hereby designates Thomas A. McDonald as the person upon whom a summons may be served within the State of New York, or any process or other paper whereby a special proceeding is commenced in a court or before an officer * * *."

The statute pursuant to which the designation was filed (quoted in Petitioners' brief, pp. 11-12) is equally silent on the subject of waiver, simply providing for the filing of a statement containing items concerning the nature of its business, its principal place of business within the state, and "designating, in the manner prescribed in the Code of Civil Procedure, a person upon whom process against the corporation may be served within the state."

(a) *The legislative history of the New York statute providing for designation by foreign corporations of agents for the service of process against them.*

Since the argument in the courts below, petitioners have evolved an elaborate argument that the New York Legislature intended to require foreign corporations to consent to be sued in New York, even though it was not expressly so provided in the statute. Apart from the objection that the argument would be subject to the constitutional objec-

tion already mentioned, it is based upon a misinterpretation of the legislative history of the provision in the New York statutes relating to designation.[17]

Stated briefly, we understand the petitioners' contention to be that provision was made in the New York statutes for "consents to be sued" by foreign corporations through the device of requiring them to designate agents for the service of process, because of a doubt, under the existing New York authorities, as to the power of the New York courts to obtain personal jurisdiction over foreign corporations, even though doing business in the state, without their consent (Petitioners' brief, pp. 19-20). The facts, as developed by petitioners, completely destroy any such inference. It is true, as petitioners indicate on p. 13 of their brief, that when the *first* statute requiring foreign corporations to designate agents for the service of process was passed,[18] there were decisions of the lower New York courts indicating that no foreign corporation could be sued in New York without its consent. There were also cases indicating the contrary (Petitioners' brief, p. 13, footnote 7). However, that first statute was repealed in 1877,[19] and from then until 1892 there was no statutory provision on the subject. During the fifteen intervening years, the courts of New York went to the opposite extreme with respect to foreign corporations, *i.e.*, it was held in at least one case

[17]Petitioners have substituted this argument for another which they unsuccessfully made in the Courts below based upon § 225 of the New York General Corporation Law. This contention was so completely demolished by the Court below (R. 94) that petitioners have apparently seen fit to abandon it.

[18]L. 1855, c. 279.

[19]L. 1877, c. 417, § 29.

(*Pope* v. *Terre Haute Car Mfg. Co.*, 87 N. Y. 137 (1881)) that jurisdiction could be obtained over foreign corporations by serving officers thereof temporarily within the state, even though the corporations did no business in New York.[20] Then, in 1892, the provision for designation of agents to receive process was reenacted.[21] Certainly in 1892 there could have been no doubt in the mind of any legislator as to the power of the New York courts to obtain personal jurisdiction over foreign corporations doing business within the state, whether or not the corporation consented to be sued. On the contrary, the purpose of the reenactment was simply to require foreign corporations engaged in business in New York to have someone in the state with authority equal to that of the officers of the corporation in respect of the service of process (see *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, 438;[22] *Emmerich Co.* v. *Sloane*, 108 App. Div. 330, 334

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[20]In 1907 the New York Court of Appeals rather reluctantly withdrew from the extreme position taken in the *Pope* case (*Grant* v. *Cananea Copper Co.*, 189 N. Y. 241), and applied the rule established by this Court in *Goldey* v. *Morning News*, 156 U. S. 518.

[21]L. 1892, c. 687, § 16.

[22]In discussing the distinction between the "implied" consent to be sued and the "express" consent to be sued which the petitioners claim there is in the present case, petitioners refer to the *Bagdon* case (Petitioners' brief, p. 20) and to *Penn. Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93 (Petitioners' brief, pp. 28, 29). The court below completely disposed of a similar point, based upon the *Bagdon* case and a similar decision in *Smolick* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S. D. N. Y. 1915), as follows (R. 94):

> "These cases are relied on as showing the corporation's consent, by its designation of an agent to accept proc-

(1st Dept., 1905); and *System Co.* v. *Advertisers Cyclopedia Co.*, 121 N. Y. Supp. 611, 612 (App. Term, 1910, not officially reported).

(b) *Petitioners' interpretation of Ex parte Schollenberger*, 96 U. S. 369.

In the *Schollenberger* case a Pennsylvania citizen brought suit in the Eastern District of Pennsylvania against four insurance companies which had designated an agent for the service of process pursuant to Pennsylvania law. At that time, the old venue statute was in force, permitting suits against persons in the district of their residence or in the district in which they might be "found". This Court held that the suit could be maintained, upon the ground that the defendants "were actually found" in the district. The petitioners place a much broader interpretation upon that decision. They construe it as a holding that, by the designation of an agent, the defendant corporations waived their venue objections under both parts of

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ess, to being sued on all transitory actions, whereas without such designation, suit would lie only in the jurisdiction where it had done the business out of which the cause of action arose. But this concerns the jurisdiction of the court over the case, not the personal privilege as to the place of the suit accorded the defendant by Jud. Code, §51. Jurisdiction over the causes was obtained, since personal service could be had on the defendants through their agents designated to accept process. * * * So here, had plaintiffs been residents of the Southern District of New York, so that the venue was properly laid, service of process upon the defendant would have been had by service upon its agent. The cases do not go beyond this or affect the requirement of venue."

the then existing venue statute, that is, under the "finding" provision and the "residence" provision. Our interpretation of the *Schollenberger* decision is that it was based entirely upon the proposition that the defendants were "actually found" in the district, and that the Court did not mean to decide anything with respect to the "residence" objection. Such interpretation is based upon what Chief Justice Waite said at p. 377 of the opinion:

> "So, as in this case, if the legislature of a State requires a foreign corporation to consent to be 'found' within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, *the fact that it is found gives the jurisdiction*, notwithstanding the finding was procured by consent. *The essential fact is the finding*, beyond which the court will not ordinarily look." (Italics added.)

and at page 378:

> "Here, the defendant companies have provided that they can be found in a district other than that in which they reside, if a particular mode of proceeding is adopted, *and they have been so found.* In our opinion, therefore, the Circuit Court has jurisdiction of the causes, and should proceed to hear and decide them." (Italics added.)

In view of this language, we submit that there can be no doubt as to the correctness of our interpretation of the *Schollenberger* decision, which is also the interpretation placed upon it by this Court in the *Denton* case in the portion of the opinion quoted at page 24, *supra.*

(c) *The effect upon the Schollenberger decision of the 1887 change in the venue statute.*

Since the provision of the venue statute relating to the "finding" of defendants was eliminated by Congress in 1887, the *Schollenberger* decision, as interpreted in the *Denton* case, is now without any bearing on problems under Judicial Code § 51 in its present form. Since petitioners misconstrue the *Schollenberger* decision in a manner not justified by the holding of the case or the language of the opinion, they likewise disregard the effect of the change in the venue statute. The net result of their argument is, therefore, that corporations can now be sued wherever they can be legally "found", *i.e.*, in any state where they comply with the statutes applicable to foreign corporations. Thus, they contend for virtual reenactment of the old venue statute repealed by Congress in 1887, in so far as corporations are concerned. We submit that such an appeal must be made to the legislative and not to the judicial branch of the Government.

CONCLUSION

The order, judgment and decree of the Circuit Court of Appeals for the Second Circuit should be affirmed. The suit does not satisfy the venue requirements of § 51 of the Judicial Code, because neither any of the petitioners nor respondent is a resident of the Southern District of New York. The respondent did not waive its right to object to the venue of the suit by qualifying to do business in

New York as a foreign corporation and designating an agent to receive service of process against it.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1939.

Neirbo Company, The A. P. Smith Manufacturing Company, *et al.*, Petitioners, *vs.* Bethlehem Shipbuilding Corporation, Ltd.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 22, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here to review the affirmance by the Circuit Court of Appeals for the Second Circuit of an order of the District Court for the Southern District of New York setting aside service of process upon Bethlehem Shipbuilding Corporation, Ltd. (hereafter called Bethlehem) and dismissing as to it petitioners' bill, 103 F. (2d) 765. The suit was based on diversity of citizenship and was not brought "in the district of the residence of either the plaintiff or the defendant." (§ 51 of the Judicial Code, Act of March 3, 1887, 24 Stat. 552, as corrected by Act of August 13, 1888, 25 Stat. 433, 28 U. S. C. § 112.[1]). We took the case, 307 U. S. —, because of the uncertainties in application of § 51, emphasized by conflict between the views below and those of the Circuit Court of Appeals for the Tenth Circuit. *Oklahoma Packing Co.* v. *Oklahoma Gas and Elec. Co.*, 100 F. (2d) 770. The sole question in the case is whether § 51 is satisfied by the designation by a foreign corporation of an agent for service of process, in conformity with the law of a state in which suit is brought against it in one of the federal courts for that state.

[1] Section 112(a) reads as follows: "Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. After a period of confusing deviation it was firmly reestablished in *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, and *Lee* v. *Chesapeake and Ohio Ry. Ibid* 653, over-ruling *Ex parte Wisner*, 203 U. S. 449, and qualifying *In re Moore*, 209 U. S. 490. All the parties may be non-residents of the district where suit is brought. *Lee* v. *Chesapeake and Ohio Ry., supra.* Section 51 "merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election." *Commercial Ins. Co.* v. *Stone Co.*, 278 U. S. 177, 179.

Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. *Commercial Ins. Co.* v. *Stone Co., supra.* Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference. The essence of the matter is that courts affix to conduct consequences as to place of suit consistent with the policy behind § 51, which is "to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found." *General Inv. Co.* v. *Lake Shore Ry., supra* at 275.

When the litigants are natural persons the conceptions underlying venue present relatively few problems in application. But in the case of corporate litigants these procedural problems are enmeshed in the wider intricacies touching the status of a corporation in our law. The corporate device is one form of associated enterprise, and what the law in effect has done is to enforce rights and duties appropriate for collective activity. *Cf. United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344; *Puerto Rico* v. *Russell*, 288 U. S. 476. It has done so largely by assimilating corporations to natural persons. The long, tortuous evolution of the methods whereby foreign corporations gained access to courts or could be brought there, is the history of judicial groping for a

reconciliation between the practical position achieved by the corporation in society and a natural desire to confine the powers of these artificial creations.[2]

It took half a century of litigation in this Court finally to confer on a corporation, through the use of a fiction,[3] citizenship in the chartering state for jurisdictional purposes. Compare *Lafayette Ins. Co.* v. *French*, 18 How. 404 with *Hope Ins. Co.* v. *Boardman*, 5 Cranch 57. Throughout, the mode of thought was metaphorical. The classic doctrine was that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588. Logically applied, this theory of non-migration prevented suit in a non-chartering state, for the corporation could not be there.[4] And such was the practice of the circuit courts[5] until the opinion of Chief Justice Waite in *Ex parte Schollenberger*, 96 U. S. 369, displaced metaphor with common sense. The essential difference between the practice which Mr. Justice Nelson[6] initiated at circuit and the decision in *Schollenberger's* case was not a matter of technical legal construction, but a way of looking at corporations. Men's minds had become habituated to corporate activities which crossed state lines. The fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities. And so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business. That service upon such an agent, in conformity with a valid state statute, constituted consent to be sued in the federal court and thereby supplanted the immunity as to venue, was the rationale of *Schollenberger's* case.

To be sure, that case arose under the Judiciary Act of 1875, 18 Stat. 470, the language of which differed from the Act of 1887, now § 51 of the Judicial Code. The earlier provision was

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[2] See Henderson, "The Position of Foreign Corporations in American Constitutional Law"; *passim*, and especially the illuminating analysis pp. 163-194.

[3] See Gray, "The Nature and Sources of the Law", 184, and Henderson, *op. cit. supra*, note 2, pp. 50-76.

[4] See *St. Clair* v. *Cox*, 106 U. S. 350, 355.

[5] "We are aware that the practice in the circuit courts generally has been to decline jurisdiction in this class of suits." 96 U. S. 369, 378.

[6] *Day* v. *Newark India Rubber Mfg. Co.*, 1 Blatch. 628; *Pomeroy* v. *New York, N. H. & H. R. R. Co.*, 4 Blatch. 120. Both these cases were decided by Mr. Justice Nelson, on circuit.

as follows: "And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found . . ." The Act of 1887 omitted the words "in which he shall be found." But, of course, the Phoenix and the Clinton Insurance Company in *Ex parte Schollenberger, supra,* were not geographically "found" in Pennsylvania, and Chief Justice Waite so recognized. They were "found" in the Eastern District of Pennsylvania only in a metaphorical sense, because they had consented to be sued there by complying with the Pennsylvania law for designating an agent to accept service. Not less than three times does the opinion point out that the corporation gave "consent" to be sued; and because of this consent the Chief Justice added that the corporation was "found" there. But the crux of the decision is its reliance upon two earlier cases, *Railroad Company* v. *Harris,* 12 Wall. 65 and *Lafayette Ins. Co.* v. *French,* 18 How. 404, recognizing that "consent" may give "venue". The Phoenix and the Clinton Insurance Company consented not to be "found" but to be sued. Since the corporation had consented to be sued in the courts of the state, this Court held that the consent extended to the federal courts sitting in that state. As to diversity cases, Congress has given the federal courts "cognizance, concurrent with the courts of the several States". The consent, therefore, extends to any court sitting in the state which applies the laws of the state.[7]

The notion that the 1887 amendment, by eliminating the right to sue a defendant in the district "in which he shall be found", was meant to affect the implications of a consent to be sued—implications which were the basis of the *Schollenberger* decision—derives from a misapplication of the purpose of Congress to contract diversity jurisdiction, based upon a misunderstanding of the legislative history of the 1887 amendment.[8] The deletion of "in which he shall be found" was not directed toward any change in the status of a corporate litigant. The restriction was designed to shut the door

[7] "While the Circuit Court may not be technically a court of the Commonwealth, it is a court within it; and that, as we think, is all the legislature intended to provide for." 96 U. S. 369, 377. See *Traction Company* v. *Mining Company,* 196 U. S. 239, 255-56; *Cf. Louisville and N. R. Co.* v. *Chatters,* 279 U. S. 320, 329.

[8] A cognate misconception as to the purpose of the Act of 1887-88 in contracting the jurisdiction of the circuit courts underlay the decision in *Ex parte Wisner,* 203 U. S. 449, overruled in *Lee* v. *Chesapeake & Ohio Ry.,* 260 U. S. 653, 659.

against service of process upon a natural person in any place where he might be caught. It confined suability, except with the defendant's consent, to the district of his physical habitation. Insofar as the 1887 legislation sheds any light upon the status of a corporate litigant in diversity suits, its significance lies outside the omission of the "he shall be found" clause. The form in which that Act passed the House of Representatives contained a provision, wholly distinct from the general venue section, restricting the growing volume of litigation drawn to the federal courts by the fiction of corporate citizenship.[9] It prohibited resort to the federal courts by foreign corporations authorized to do a local business. The Senate rejected, as it had done upon three previous occasions, this House proposal.[10] But the bill, as it left the House, also contained the venue provision, with its omission of the "found" clause. It would be strange indeed if the House in § 1 had dealt with the "venue" of suits against corporate litigants who, like those involved in the *Schollenberger* case, by § 3 of the same bill were completely barred from the federal courts. It would be stranger still if, after passing a drastic measure curtailing resort by foreign corporations to the federal courts, the House had only succeeded in giving discriminatory freedom to foreign corporations—discriminatory in that, by nullifying the significance of consent through obedience to state law to be sued in the federal courts, it would allow a foreign corporate defendant freedom either to remain in the state courts or to remove to a federal court.

And so, after the Act of 1887 and despite its elimination of "in which he shall be found" from the Act of 1875, lower federal courts continued to apply the doctrine of *Schollenberger's* case by considering the designation of an agent for service of process an effective consent to be sued in the federal courts.[11] This practice in

[9] The Culberson Bill, which passed the House in 1887, was H. R. 2441, 49th Cong., 1st Sess. It provided in its original form that the lower federal courts should not take "cognizance of any suit" between "a corporation created or organized by or under the laws of any State and a citizen of any State in which such corporation at the time the cause of action accrued may have been carrying on any business authorized by the law creating it. . . ." There were likewise provisions forbidding removal of such suits to the lower Federal courts. See 17 Cong. Rec. 614; H. Rep. No. 1078, 49th Cong., 1st Sess.

[10] 10 Cong. Rec. 1304-1305; 14 Cong. Rec. 1270; 15 Cong. Rec. 4909.

[11] *Riddle* v. *New York R. Co.*, 39 Fed. 290 (C. C., W. D. Pa., 1889); *Consol. Store-Service Co.* v. *Lamson Consol. Store-Service Co.*, 41 Fed. 833 (C. C. Mass., 1890) approvingly cited in *Haight & Freese Co.* v. *Weiss*, 156 Fed. 328 (C. C. A. 1st, 1907).

the lower federal courts continued until 1892, when *Southern Pacific Co.* v. *Denton*, 146 U. S. 202 was decided. But that case involved an entirely different situation. The Court was there concerned with a Texas statute which not merely regulated procedure for suit but sought to deny foreign corporations access to the federal courts. This Court held the act unconstitutional, as the Texas court had in fact already done.[12] Inasmuch as the Texas act was found to be void, it "could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."[13] To be sure, the Court went on to interpret the agreement "if valid"[14] and to suggest that had it been valid the agreement might have subjected the corporation to jurisdiction "so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was 'found'."[15] Such, as we have seen, was not the true basis of the decision in *Schollenberger's* case. As decisions, the two cases are wholly consistent. But, disregarding the situation before the Court in the *Denton* case—the absence of any valid consent to be sued because of the invalidity of the statute by which the alleged "consent" was obtained—several of the lower courts have taken language from the *Denton* opinion and have made it govern situations where valid consent did exist because given in conformity with the provisions of a valid statute.[16] Other courts have adhered to the

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12 *Texas Land & Mortgage Co.* v. *Worsham*, 76 Tex. 556.

13 146 U. S. at 207.

14 146 U. S. at 207.

15 146 U. S. at 207. The Denton case was based on *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, in which there was no consent derivable from the designation of an agent for service. Both opinions were written by Mr. Justice Gray, who later accurately delimited the scope of the holdings in both the *Shaw* and the *Denton* cases. *In re Keasbey & Mattison Co.*, 160 U. S. 221, 229. The decisive difference between the present case and *In re Keasbey & Mattison Co.*, is that in the latter case the designation under state law which is the basis of consent had in fact not been made. But the requirement of "residence" in the Act of 1887 is as much satisfied by a consent to be sued as was the requirement "to be found" in the 1875 Act satisfied by such a consent.

16 *Platt* v. *Mass. B. E. Co.*, 103 Fed. 705 (C. C. Mass., 1900); *Hagstoz* v. *Mutual Life Ins. Co.*, 179 Fed. 569 (C. C. E. D. Pa., 1900); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Jones* v. *Consol. Wagon Co.*, 31 F. (2d) 384 (D. Mass., 1928); *Kerfoot* v. *United Dairy Co.*, 38 F. (2d) 691 (D. Del., 1930); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (D. Md., 1931); *McLean* v. *Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938); *Gray* v. *Reliance Ins. Co.*, 24 F. Supp. 144 (W. D. La., 1938); *Hamilton Watch Co.* v. *George W. Borg Co.*, 27 F. Supp. 215 (N. D. Ill., 1939); *Toulmin* v. *James Mfg. Co.*, 27 F. Supp. 512 (W. D. N. Y., 1939). *Cf. Heine Chimney Co.* v. *Rust Engineering Co.*, 12 F. (2d) 596 (C. C. A. 2nd, 1926).

practice established by *Schollenberger's* case.[17] We deem this practice sound, and it controls the present case.

In conformity with what is now § 210 of the General Corporation Law of New York,[18] Bethlehem designated "William J. Brown as the person upon whom a summons may be served within the State of New York." The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals, speaking through Judge Cardozo: "The stipulation is, therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person 'upon whom process against the corporation may be served'. . . . The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person." *Bagdon* v. *Phil. and Reading C. & I. Co.*, 217 N. Y. 432, 436-7. A statute calling for such a designation is constitutional, and the designation of the agent "a voluntary act." *Penna. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93.

In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that "state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case." *Ex parte Schollenberger, supra* at 377. The judgment below is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[17] *Shainwald* v. *Davids*, 69 Fed. 704 (N. D. Cal., 1895); *Dodge Mfg. Co.* v. *Patten*, 23 F. (2d) 852 (D. Ind., 1928), aff'd 60 F. (2d) 676 (C. C. A. 7th, 1932); *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.*, 100 F. (2d) 770 (C. C. A. 10th, 1938).

[18] Originally enacted as c. 687, Laws of 1892, pp. 1805-1806.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1939.

Neirbo Company, The A. P. Smith Manufacturing Company, et al., Petitioners, *vs.* Bethlehem Shipbuilding Corporation, Ltd.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 22, 1939.]

Mr. Justice Roberts.

The Circuit Court of Appeals, in a careful and discriminating opinion,[1] has held that to deny the respondent's motion to dismiss it from the suit would be to disregard the long settled construction of Sec. 51 of the Judicial Code and the equally well settled application of that section. I think its judgment should be affirmed.

Whatever may be said in support of the original adoption of a different rule, it has been the law for a century that, as respects the jurisdiction of the federal courts over a corporation in diversity of citizenship cases, the corporation is a citizen and resident of the state of incorporation and of no other state. I do not understand the court's opinion to repudiate the rule.

The statute which is now § 51 of the Judicial Code took its present form in 1888. In 1892 the court held, in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453, that, under the statute, "a corporation, incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State." This construction has been followed in this court without deviation and with practical unanimity by the lower federal courts.[2]

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[1] 103 F. (2d) 765.

[2] In re Keasbey and Mattison Co., 160 U. S. 221; Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501; Ladew v. Tennessee Copper Co., 218 U. S. 357; Male v. Atchison &c. Ry., 240 U. S. 97; General Inv. Co. v. Lake Shore Ry., 260 U. S. 261, 271; Seaboard Rice Milling Co. v. Chicago,

At the next term, in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 205, 207, the ruling was reaffirmed in a case where the defendant had registered as a foreign corporation under a state law and, as a condition of registration, had agreed that service of process might be made upon a designated agent.

The earlier Act of 1875 provided that no civil suit could be brought against a defendant in a United States court "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process" . . . .

Ex parte Schollenberger, 96 U. S. 369, applied that earlier statute. The court held that a foreign corporation which had registered and consented to the service of process upon a designated agent had thereby agreed "to be found" within the state and might therefore be impleaded in a federal court sitting in the state although it was not a citizen or a resident of the state. The case was cited in the opinions in both the *Shaw* and the *Southern Pacific* cases. In the latter the court said, referring to the foreign corporation's agreement as to service: (pp. 207-8) "It might likewise have subjected the corporation to the jurisdiction of a Circuit Court of the United States held within the State—so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was found. . . . But such an agreement could not, since Congress (as held in *Shaw* v. *Quincy Mining Co.* above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up non-compliance with that test, when sued in a Circuit Court of the United States."

In re Keasbey and Mattison Co., 160 U. S. 221, the court held (p. 228): "Under the provision of that act [the earlier act of 1875], which allowed a defendant to be sued in the district of which he was an inhabitant, or in that in which he was found, a corporation could doubtless have been sued either in the district in which it was incorporated, or in any district in which it carried on business and had a general agent." For this statement the court cited *Ex parte Schollenberger*, *Shaw* v. *Quincy Mining Company*, and *Southern Pacific Company* v. *Denton*. The opinions in the last two, and that

R. I. & P. Ry. Co., 270 U. S. 363; Luckett v. Delpark, Inc., 270 U. S. 496; Burnrite Coal Co. v. Riggs, 274 U. S. 208, 211. The decisions in the federal courts are cited and discussed by the Circuit Court of Appeals, 103 F. (2d) 767.

in the *Keasbey* case, were written for the court by Mr. Justice Gray, who summed up their effect by saying: "And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant or a resident of a State in which it has not been incorporated; and, consequently, that a corporation incorporated in a State of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a Circuit Court of the United States held in another State, even if the corporation has a usual place of business in that State."

This interpretation of Sec. 51 has since remained unchanged. Congress must have known of and acquiesced in the courts' construction of the section, particularly as there have been efforts to amend it, and no alteration has been adopted.

Upon principle, and under the authorities, the mere fact that service of process valid under state law can be had on an officer or agent of a foreign corporation doing business within the state is irrelevant; for although the corporation may be served in conformity to local law, it cannot be compelled to try its case in a federal court sitting in the state. I do not understand the opinion of the court to hold to the contrary.

But it is said that registration and designation of an agent upon whom service may be made under compulsion of state law amounts to a waiver of the requirements of Sec. 51 as to venue, or to a consent to be sued in a federal court sitting within the state.

As has been shown by quotation from the opinion, this contention was made in *Southern Pacific Co.* v. *Denton, supra,* and was overruled. The holding was one of the alternative grounds of decision. The *Southern Pacific* case settled the application of Sec. 51, in the circumstances here disclosed, and the decision has never been qualified or overruled. The lower federal courts have understood and applied that decision with practical uniformity to enable the foreign corporation to contest the venue of suits against it.[3]

I see no reason at this late day to attribute a new effect to the statute when Congress has not seen fit to express a view contrary to that embodied in this court's construction of the law; though this might at any time be done. The principle of *stare decisis* seems to me to make against such a change.

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[3] Some of the cases are cited by the Circuit Court of Appeals in its opinion. 103 F. (2d) 769.

The court below has analyzed the applicable New York statute and has satisfactorily demonstrated that it deals with service of process on foreign corporations in the courts of New York. The state could not, by its laws, affect the jurisdiction of federal courts or the venue of suits therein,—a matter solely within the control of Congress.

The CHIEF Justice and Mr. Justice MCREYNOLDS join in this opinion.